

BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR) FINDINGS OF FACT,
CHANGE OF APPROPRIATION WATER) CONCLUSIONS OF LAW,
RIGHT NO. 11454-c41C BY JOSEPH) AND ORDER
R. AND DOROTHY JEAN PETERSON.)

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on June 1, 1978, at Virginia City, Montana, for the purpose of hearing objections to the above-named Application for Change of Appropriation Water Right No. 11,454-c41C, William Throm, Hearing Examiner presiding.

The Applicants, Joseph R. and Dorothy Jean Peterson, appeared at the hearing and presented testimony in support of the application. Mr. and Mrs. Peterson were represented by legal counsel, Mr. Douglas Smith of Sheridan, Montana. Seven (7) exhibits were introduced supporting the application, to wit:

Applicant's Exhibits:

- A-1--copy of Daughterman vs. Gilbert map.
- A-2--copy of Daughterman vs. Gilbert Civil Case #3089, Vol. 309, (2 pages).
- A-3--copy of Daughterman vs. Gilbert Civil Case #3089, Vol. 307, (3 pages).
- A-4--copy of Daughterman vs. Gilbert Civil Case #3089, Vol. 308, (2 pages).
- A-5--copy of Daughterman vs. Gilbert Civil Case #3089, Vol. 6, (3 pages).
- A-6--copy of Daughterman vs. Gilbert Civil Case #3089, Vol. 6, (9 pages).
- A-7--copy of Daughterman vs. Gilbert Civil Case #3089, Vol. 6, (8 pages).

The Applicant's exhibits were marked accordingly and received into the record with objections.

CASE # 11454

1 Mr. Carl W. Flager appeared at the hearing and testified
2 in support of the application.

3 Two Objectors, Eugene and Faythe Larson, attended the
4 hearing and presented testimony or statements. They were
5 represented by legal counsel, Mr. John Jardine of Whitehall,
6 Montana. The Objectors introduced one (1) exhibit supporting
7 their objection to wit:

8 Objector's Exhibit:

9 0-1--Deed for real estate.

10 The Objector's exhibits were marked accordingly and received
11 into the record without objections. Other witnesses for the
12 Objectors were Wilma Hudson, Bill Larson, Lester Stiles and
13 Clair Wessel. Bob Peter, Water Rights Analyst, testified for
14 the Department. Other Montana Department of Natural Resources
15 and Conservation personnel present were Forrest Tevebaugh,
16 Assistant Hearing Examiner, and Jan Fishburn, Hearings
17 Recorder. The Department was not represented by legal
18 counsel. The Department introduced three (3) exhibits to
19 wit:

20 Department's Exhibits:

21 D-1--copy--page 56, Water Resource Survey,
Madison County, Montana.

22 D-2--copy--Ruby River Water Decree, Civil
23 Case No. 3089 (2 pages).

24 D-3--copy--Field Notes from State Engineer's
25 Madison County Water Resources
Survey (2 pages).

26 The Department Exhibits were marked accordingly and received
27 into the record without objections.

28
29 MOTIONS

30 Prior to the hearing two motions concerning the validity
31 of the jurisdiction of the Department were made by Mr. John
32 Jardine, counsel for the Objectors. The first motion was to
dismiss the Application for Change of Appropriation Water

1 Right No. 11,454-c41C because the hearing was not held
2 within sixty days after the closing of the objection period
3 as prescribed by Section 89-883 R.C.M. 1974. The Hearing
4 Examiner considers that the administrative remedy provided
5 by the cited statute is intended for the benefit of the
6 Applicant. The second motion to dismiss was based on Mr.
7 Jardine's contention that the Department would first have to
8 make a determination of the Peterson's water right before a
9 change could be granted.

10 The Hearing Examiner has reason to believe that the
11 Peterson's are the successors-in-right to two water rights
12 that may or may not be recognized by any future adjudication,
13 however, as testimony later revealed, these rights have been
14 recognized in the Ruby River Decree and other past litigation
15 and will be accepted prima facie for the purpose of this
16 hearing.

17 Therefore, both motions are denied.
18

19 FINDINGS OF FACT

20 1. On February 23, 1977, the Department received an
21 Application for Change of Appropriation Water Right No.
22 11,454-c41C by Joseph R. and Dorothy Jean Peterson to change
23 portions of the following water right: A claimed decreed
24 right granted to Ralph and Alexander Peterson for 50 miners
25 inches from Cream Creek, a tributary of the Ruby River,
26 priority date 1885, as filed under Case No. 3089 in the 5th
27 Judicial District Court, Madison County, Montana. The above
28 water has been diverted from Cream Creek at a point in the
29 SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, Township 9 South, Range 4 West,
30 M.P.M., and used for irrigation on a total of 25 acres, more
31 or less, all contained within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3, and
32

1 the N½ NW¼ of Section 11, Township 9 South, Range 4 West,
2 M.P.M., from May 10 to August 15, inclusive, of each year.

3 The proposed changes are as follows: To move the point
4 of diversion further upstream to a point in the SE¼ NW¼ SW¼
5 of Section 14, Township 9 South, Range 4 West, M.P.M. and to
6 irrigate a total of 25 acres, more or less, in the W½ W½ of
7 said Section 14, from May 10 to August 15, inclusive, of each
8 year. The proposed changes are for the point of diversion
9 and place of use and for no other reason.

10 2. On September 1, 8 and 15, 1977, the Department
11 caused to be duly published in the Madisonian, Virginia
12 City, Montana, notice of the above application for Change of
13 Appropriation Water Right No. 11,454-c41C.

14 3. On October 20, 1977 the Department received an
15 Objection to Application for Change of Appropriation Water
16 Right No. 11,454-c41C from Mr. Eugene Larson and Mrs. Faythe
17 Larson.

18 4. The Applicant, Joseph Peterson, age 58, of Alder,
19 Montana testified that he had resided and ranched near Cream
20 Creek on the Ruby River for twenty-two years. Further, that
21 the water rights that he is successor-in-interest to were in
22 the amount of fifty (50) miner's inches from the Cream Creek
23 with a priority date of 1885 and for one-fifth of the seventy-
24 five (75) miner's inches water right with a 1912 priority
25 date. Peterson said that both appropriations had been
26 utilized in the past for both stock watering and for "twenty
27 to thirty" acres of irrigation. He agreed that during some
28 low water years Cream Creek may not supply sufficient water
29 to irrigate both his acreage and that of the Objectors.
30 Peterson said that the acreage that he had irrigated from
31 Cream Creek in the past would be irrigated from his Ruby
32 River water right and that to attempt to irrigate additional
land from Cream Creek would constitute an excessive burden

1 on the stream during most years. He later stated that he
2 and the Objectors had a "run-in" in the past over Cream
3 Creek water that was not resolved.

4 Mr. Carl W. Flager testified that during the years
5 1947-1955 he irrigated for the successors-in-interest to the
6 property of both the Applicants and Objectors. He used
7 Cream Creek water to irrigate in the early spring on property
8 now owned by both the Applicant and Objector.

9 Mrs. Faythe Larson testified that she, her husband,
10 Gene Larson and her sister, Wilma Hudson were the current
11 owners of four-fifths (4/5) of the one hundred-sixty (160)
12 acres previously owned by Samuel Peterson. She also stated
13 that the remaining one-fifth (1/5) of the original Samuel
14 Peterson, one hundred-sixty (160) acres, was now owned by
15 the Applicants. Mrs. Larson further testified that Cream
16 Creek water had not been used exclusively on the property
17 owned by the Objectors.

18 Mr. Eugene Larson testified that he had irrigated
19 approximately nineteen (19) acres out of the old Samuel
20 Peterson holdings since 1957. He stated that said irrigation
21 had been with Cream Creek water, starting about the first of
22 June each year. He acknowledged that the Applicant did make
23 use of that water earlier in the year for stockwater and
24 possibly for irrigation. He further stated that some years
25 there was not sufficient water available in Cream Creek for
26 irrigation season. Mr. Larson also said that he occasionally
27 irrigated from Cream Creek in the fall of the year.

28 Mrs. Wilma Hudson testified that she knew very little
29 about the actual irrigation from Cream Creek but that she
30 had heard he uncle, Sam Peterson, talk about the stream
31 being low in mid-summer. She knew of no past conflicts over
32 the use of Cream Creek water.

1 Mr. Bill Larson testified that he had operated the
2 Larson Ranch since 1960. He stated that during dry years he
3 had to divert the entire flow of Cream Creek to irrigate the
4 previously named nineteen (19) acres. He further said that
5 if the Applicant were to divert Cream Creek water upstream
6 from his diversion that his crop would suffer during dry
7 years.

8 Bill Larson testified that he irrigated his nineteen
9 (19) acres throughout the month of June from Cream Creek and
10 had never come into conflict with the Applicant over the
11 practice.

12 Mr. Clair Wessel testified that he irrigated the land
13 of the Objector for two years and that during that time he
14 used the entire flow of Cream Creek when he needed it. He
15 further stated that he never came into conflict with the
16 Applicant over this use practice. He was unsure of specific
17 dates and years that he irrigated but stated that he irrigated
18 both in the spring and fall.

19 Mr. Lester Stiles testified that he irrigated the land
20 now owned by the Objectors from 1927 to 1929. He said that
21 in mid-summer he diverted the entire flow of Cream Creek to
22 irrigate the acreage now owned by the Objectors. He further
23 stated that there was never any conflict over this practice.

24 Mr. Bob Peter testified to the methods used to gather
25 field data that were included in the Water Resources Survey
26 of Madison County, Montana, 1954, which was entered into
27 the record of the proceedings without exception. He further
28 testified that the data used to support land ownership in
29 the Survey came from the Madison County Courthouse records.

1 CONCLUSIONS OF LAW

2
3 1. Under the provisions of Section 89-892 R.C.M. 1947,
4 (1) "An appropriator may not change the place of diversion,
5 place of use, purpose of use or place of storage except as
6 permitted under this section and approved by the department."

7 2. Section 89-892 R.C.M. 1947, (2) requires in part
8 that "the department shall approve the proposed change if it
9 determines that the proposed change will not adversely
10 affect the rights of other persons."

11 3. The Applicant appears to be entitled to a decreed
12 right for fifty (50) miner's inches from Cream Creek with an
13 1885 priority date, as filed under Civil Case No. 3089 in
14 the 5th Judicial District Court, Madison County, Montana.

15 4. The Objectors claim for four-fifths (4/5) of a
16 decreed right for seventy-five (75) miner's inches from
17 Cream Creek with a 1912 priority date also appears valid.
18 The remaining one-fifth (1/5) of that right appears to
19 belong to the Applicant.

20 5. Section 89-892 (4) R.C.M., 1947, states "The
21 department may approve a change subject to such terms,
22 conditions, restrictions, and limitations it considers
23 necessary to protect the rights of other appropriators,
24 including limitations on the time for completion of the
25 change."

26 6. For the purpose herein, based upon testimony given
27 at the hearing, it is concluded that Cream Creek water is
28 available on a limited basis which could be put to beneficial
29 use as requested in the Application for Change of Appropriation
30 Water Right No. 11,454-c41C by Joseph R. and Dorothy Jean
31 Peterson.

32 7. For the purposes herein, based upon testimony given

1 at the hearing, it is concluded that the Objectors claimed
2 exclusive past use of Cream Creek water is not a valid
3 claim.

4 8. It is further concluded that the rights of other
5 persons will be protected if the requested change is conditioned
6 to protect those rights.

7 9. Based upon the above Findings of Fact and specifically
8 based upon any conditions and limitations appearing therein,
9 it is concluded that the criteria for the issuance of
10 Authorization to Change Appropriation Water Right as delineated
11 in Section 89-892 R.C.M. 1947 has been met.

12 10. It is concluded that the issuing of Authorization
13 to Change Appropriation Water Right No. 11,454-c41C in no
14 way reduces the Applicants' liability for damage caused by
15 the Applicants' exercise of such authorization.

16 11. It is concluded that nothing decided herein has
17 bearing on the status of water rights claimed by the Applicants
18 other than those specifically cited, nor does anything
19 decided herein have bearing on the status of claimed rights
20 of any other party except in relation to the change herein
21 applied for, to the extent necessary to reach a conclusion.

22 Based on the above Findings of Fact and Conclusions of
23 Law, the following Final Order is made:

24 FINAL ORDER

25 1. Subject to the conditions and limitations imposed
26 below, the Application to Change Appropriation Water Right
27 No. 11,454-c41C by Joseph R. and Dorothy Jean Peterson is
28 hereby granted to change portions of the following water
29 right: A claimed decreed right granted to Ralph and Alexander
30 Peterson for 50 miner's inches from Cream Creek, a tributary
31 of the Ruby River, priority date 1885, as filed under Case
32 No. 3089 in the 5th Judicial District Court, Madison County,
Montana. The above water has been diverted from Cream Creek

1 at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, Township 9
2 South, Range 4 West, M.P.M., and used for irrigation on a
3 total of 25 acres, more or less, all contained within the
4 SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3 and the N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 11, Township
5 9 South, Range 4 West, M.P.M., from May 10 to August 15,
6 inclusive, of each year.

7 The changes are as follows: To move the point of
8 diversion further upstream to a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of
9 Section 14, Township 9 South, Range 4 West, M.P.M. and to
10 irrigate a total of 25 acres, more or less, in the W $\frac{1}{2}$ W $\frac{1}{2}$ of
11 Section 14, from May 10 to May 31, inclusive, of each year.
12 The approved changes are for the point of diversion, place of
13 use and period of diversion and for no other reason.

14 2. That from June 1 through August 15, the priorities
15 and places of use reflected in the Ruby River Decree shall
16 prevail, except that the Permittee upon determination that
17 no adverse affect will be done to the Objector may temporarily
18 change the use of the subject appropriation to the new lands
19 described herein.

20 3. The Permittee shall install and maintain adequate
21 measuring devices to enable the Permittee to keep record of
22 all quantities of water diverted and used, as well as the
23 periods of such diversion and use. Such records shall be
24 presented to the Department for inspection upon demand.

25 4. The granting of Authorization to Change Appropriation
26 Water Right No. 11,454-c41C by the Department in no way
27 reduces or alters the Permittees' liability for damage
28 caused by the Permittees' exercise of said change authorization,
29 nor does the Department in issuing this change in any way
30


1 acknowledge liability for damage caused by the Permittee's
2 exercise of this Authorization.

3 5. The granting of this Authorization to Change
4 Appropriation Water Right in no way grants the Permittee any
5 right to violate rights of any other party, nor does it
6 excuse the Permittee from any liability for same, even if
7 such violation is a necessary and unavoidable consequence of
8 exercising this change.

9 The Hearing Examiner's final decision may be appealed
10 in accordance with the Montana Administrative Procedures
11 Act, by filing a petition in the appropriate court within
12 thirty (30) days after service of the Final Decision and
13 Order.

14 As stated prior to the Hearing by William F. Throm, who
15 has since retired, the Final Order, Findings of Fact and
16 Conclusions of Law were prepared by the undersigned, who was
17 present during the entire hearing proceeding.

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19 DATED this 11th day of July, 1979.

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22 FORREST TEVEBAUGH D. N. R. & C.
23 Hearing Examiner
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BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR)
CHANGE OF APPROPRIATION WATER)
RIGHT NO. 11,454-c41C BY JOSEPH) PROPOSAL FOR DECISION
R. AND DOROTHY JEAN PETERSON.)

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on June 1, 1978, at Virginia City, Montana, for the purpose of hearing objections to the above-named Application for Change of Appropriation Water Right No. 11,454-c41C, William Throm, Hearing Examiner presiding.

The Applicants, Joseph R. and Dorothy Jean Peterson, appeared at the hearing and presented testimony in support of the application. Mr. and Mrs. Peterson were represented by legal counsel, Mr. Douglas Smith of Sheridan, Montana. Seven (7) exhibits were introduced supporting the application, to wit:

Applicant's Exhibits:

- A-1--copy of Daughterman vs. Gilbert map.
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The Applicant's exhibits were marked accordingly and received into the record with objections.

1 Mr. Carl W. Flager appeared at the hearing and testified in
2 support of the application.

3 Two Objectors, Eugene and Faythe Larson, attended the
4 hearing and presented testimony or statements. They were
5 represented by legal counsel, Mr. John Jardine of Whitehall,
6 Montana. The Objectors introduced one (1) exhibit supporting
7 their objection to wit:

8 Objector's Exhibit:

9 0-1--Deed for real estate.

10 The Objector's exhibits were marked accordingly and received into
11 the record without objections. Other witnesses for the Objectors
12 were Wilma Hudson, Bill Larson, Lester Stiles and Clair Wessel.
13 Bob Peter, Water Rights Analyst, testified for the Department.
14 Other Montana Department of Natural Resources and Conservation
15 personnel present were Forrest Tevebaugh, Assistant Hearing
16 Examiner, and Jan Fishburn, recorder. The Department was not
17 represented by legal counsel. The Department introduced three (3)
18 exhibits to wit:

19 Department's Exhibits:

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Madison County, Montana.

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22 Case No. 3089 (2 pages).

23 D-3--copy--Field Notes from State Engineer's,
24 Madison County Water Resources
Survey (2 pages).

25 The Department Exhibits were marked accordingly and received into
26 the record without objections.

27
28 MOTIONS

29 Prior to the hearing two motions concerning the validity
30 of the jurisdiction of the Department were made by Mr. John Jardine,
31 counsel for the Objectors. The first motion was to dismiss the
32 Application for Change of Appropriation Water Right No. 11,454-c41C

1 because the hearing was not held within sixty days after the
2 closing of the objection period as prescribed by Section
3 89-883 R.C.M. 1947. The Hearing Examiner considers that the
4 administrative remedy provided by the cited statute is intended
5 for the benefit of the Applicant. The second motion to dismiss
6 was based on Mr. Jardine's contention that the Department would
7 first have to make a determination of the Peterson's water right
8 before a change could be granted.

9 The Hearing Examiner has reason to believe that the Peterson's
10 are the successors-in-right to two water rights that may or may
11 not be recognized by any future adjudication, however, as
12 testimony later revealed, these rights have been recognized in
13 the Ruby River Decree and other past litigation and will be
14 accepted prima facie for the purpose of this hearing.

15 Therefore, both motions are denied.

16
17 PROPOSED FINDINGS OF FACT

18 1. On February 23, 1977, the Department received an
19 Application for Change of Appropriation Water Right No.
20 11,454-c41c by Joseph R. and Dorothy Jean Peterson to change
21 portions of the following water right: A claimed decreed right
22 granted to Ralph and Alexander Peterson for 50 miners inches
23 from Cream Creek, a tributary of the Ruby River, priority date
24 1885, as filed under Case No. 3089 in the 5th Judicial District
25 Court, Madison County, Montana. The above water has been
26 diverted from Cream Creek at a point in the SE1/4NW1/4NE1/4
27 of Section 11, Township 9 South, Range 4 West, M.P.M., and used
28 for irrigation on a total of 25 acres, more or less, all contained
29 within the SE1/4SE1/4 of Section 3, and the N1/2NW1/4 of Section 11,
30 Township 9 South, Range 4 West, M.P.M., From May 10 to August 15,
31 inclusive, of each year.
32

1 The proposed changes are as follows: To move the point
2 of diversion further upstream to a point in the SE1/4NW1/4SW1/4
3 of Section 14, Township 9 South, Range 4 West, M.P.M. and to
4 irrigate a total of 25 acres, more or less, in the W1/2W1/2 of
5 said Section 14, from May 10 to August 15, inclusive of each
6 year. The proposed changes are for the point of diversion and
7 place of use and for no other reason.

8 2. On September 1, 8 and 15, 1977, the Department caused
9 to be duly published in the Madisonian, Virginia City, Montana,
10 notice of the above application for Change of Appropriation Water
11 Right No. 11,454-c41C.

12 3. On October 20, 1977 the Department received an Objection
13 to Application for Change of Appropriation Water Right No.
14 11,454-c41C from Mr. Eugene Larson and Mrs. Faythe Larson.

15 4. The Applicant, Joseph Peterson, age 58, of Alder,
16 Montana testified that he had resided and ranched near Cream
17 Creek on the Ruby River for twenty-two years. Further, that
18 the water rights that he is successor-in-interest to were in
19 the amount of fifty (50) miners inches from the Cream Creek with
20 a priority date of 1885 and for one-fifth of a seventy-five (75)
21 miners inches water right with a 1912 priority date. Peterson
22 said that both appropriations had been utilized in the past for
23 both stock watering and for "twenty to thirty" acres of irrigation.
24 He agreed that during some low water years Cream Creek may not
25 supply sufficient water to irrigate both his acreage and that of
26 the Objectors. Peterson said that the acreage that he had
27 irrigated from Cream Creek in the past would be irrigated from
28 his Ruby River water right and that to attempt to irrigate
29 additional land from Cream Creek would constitute an excessive
30 burden on the stream during most years. He later stated that he
31 and the Objectors had a "run-in" in the past over Cream Creek
32 water that was not resolved.

1 Mr. Carl W. Flager testified that during the years
2 1947-1955 he irrigated for the successors-in-interest to
3 the property of both the Applicants and Objectors. He used
4 Cream Creek water to irrigate in the early spring on property
5 now owned by both the Applicant and Objector.

6 Mrs. Faythe Larson testified that she, her husband,
7 Gene Larson and her sister, Wilma Hudson were the current
8 owners of four-fifths (4/5) of the one hundred-sixty (160)
9 acres previously owned by Samuel Peterson. She also stated
10 that the remaining one-fifth (1/5) of the original Samuel
11 Peterson, one hundred-sixty acres, was now owned by the Applicants.
12 Mrs. Larson further testified that Cream Creek water had not
13 been used exclusively on the property owned by the Objectors.

14 Mr. Eugene Larson testified that he had irrigated
15 approximately nineteen (19) acres out of the old Samuel Peterson
16 holdings since 1957. He stated that said irrigation had been
17 with Cream Creek water, starting about the first of June each
18 year. He acknowledged that the Applicant did make use of that
19 water earlier in the year for stockwater and possibly for
20 irrigation. He further stated that some years there was not
21 sufficient water available in Cream Creek for irrigation other
22 than his nineteen (19) acres in the late irrigation season.
23 Mr. Larson also said that he occasionally irrigated from Cream
24 Creek in the fall of the year.

25 Mrs. Wilma Hudson testified that she knew very little about
26 the actual irrigation from Cream Creek but that she had heard
27 her uncle, Sam Peterson, talk about the stream being low in
28 mid-summer. She knew of no past conflicts over the use of
29 Cream Creek water.

30 Mr. Bill Larson testified that he had operated the Larson
31 Ranch since 1960. He stated that during dry years he had to
32 divert the entire flow of Cream Creek to irrigate the previously

1 named nineteen (19) acres. He further said that if the Applicant
2 were to divert Cream Creek water upstream from his diversion
3 that his crop would suffer during dry years.

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5 acres throughout the month of June from Cream Creek and had
6 never come into conflict with the Applicant over the practice.

7 Mr. Clair Wessel testified that he irrigated the land of
8 the Objector for two years and that during that time he used
9 the entire flow of Cream Creek when he needed it. He further
10 stated that he never came into conflict with the Applicant
11 over this use practice. He was unsure of specific dates and
12 years that he irrigated but stated that he irrigated both in
13 the spring and fall.

14 Mr. Lester Stiles testified that he irrigated the land now
15 owned by the Objectors from 1927 to 1929. He said that in
16 mid-summer he diverted the entire flow of Cream Creek to
17 irrigate the acreage now owned by the Objectors. He further
18 stated that there was never any conflict over this practice.

19 Mr. Bob Peter testified to the methods used to gather
20 field data that were included in the Water Resources Survey of
21 Madison County, Montana, 1954 which was entered into the record
22 of the proceedings without exception. He further testified that
23 the data used to support land ownership in the Survey came from
24 the Madison County Courthouse records.

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26 Proposed Conclusions of Law

27 1. Under the provisions of Section 89-892 R.C.M. 1947,
28 (1) "An appropriator may not change the place of diversion,
29 place of use, purpose of use or place of storage except as
30 permitted under this section and approved by the department."
31
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1 2. Section 89-892 R.C.M. 1947, (2) requires in part that
2 "the department shall approve the proposed change if it
3 determines that the proposed change will not adversely affect the
4 rights of other persons."

5 3. The Applicant appears to be entitled to a decreed
6 right for fifty (50) miners inches from Cream Creek with an
7 1885 priority date, as filed under Civil Case No. 3089 in the
8 5th Judicial District Court, Madison County, Montana.

9 4. The Objectors claim for four-fifths (4/5) of a decreed
10 right for seventy-five (75) miners inches from Cream Creek with
11 a 1912 priority date also appears valid. The remaining
12 one-fifth (1/5) of that right appears to belong to the Applicant

13 5. Section 89-892 (4) R.C.M., 1947, states "The department
14 may approve a change subject to such terms, conditions, restrictions,
15 and limitations it considers necessary to protect the rights of
16 other appropriators, including limitations on the time for
17 completion of the change."

18 6. For the purpose herein, based upon testimony given at
19 the hearing, it is concluded that Cream Creek water is available
20 on a limited basis which could be put to beneficial use as
21 requested in the Application for Change of Appropriation Water
22 Right No. 11,454-c41C by Joseph R. and Dorothy Jean Peterson.

23 7. For the purposes herein, based upon testimony given at
24 the hearing, it is concluded that the Objectors claimed
25 exclusive past use of Cream Creek water is not a valid claim.

26 8. It is further concluded that the rights of other persons
27 will be protected if the requested change is conditioned to
28 protect those rights.

29 9. Based upon the above Proposed Findings of Fact and
30 specifically based upon any conditions and limitations appearing
31 therein, it is concluded that the criteria for the issuance of
32 Authorization to Change Appropriation Water Right as delineated

1 in Section 89-892 R.C.M. 1947 has been met.

2 10. It is concluded that the issuing of Authorization
3 to Change Appropriation Water Right No. 11,454-c41C in no way
4 reduces the Applicants' liability for damage caused by the
5 Applicants' exercise of such authorization.

6 11. It is concluded that nothing decided herein has
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8 other than those specifically cited, nor does anything decided
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10 party except in relation to the change herein applied for, to
11 the extent necessary to reach a conclusion.

12 Based on the above Proposed Findings of Fact and Proposed
13 Conclusions of Law, the following Proposed Order is made:

14
15 PROPOSED ORDER

16
17 1. Subject to the conditions and limitations imposed
18 below, the Application to Change Appropriation Water Right
19 No. 11,454-c41C by Joseph R. and Dorothy Jean Peterson is
20 hereby granted to change portions of the following water right:
21 A claimed decreed right granted to Ralph and Alexander Peterson
22 for 50 miners inches from Cream Creek, a tributary of the Ruby
23 River, priority date 1885, as filed under Case No. 3089 in the
24 5th Judicial District Court, Madison County, Montana. The
25 above water has been diverted from Cream Creek at a point in
26 the SE1/4 NW1/4 NE1/4 of Section 11, Township 9 South, Range 4
27 West, M.P.M., and used for irrigation on a total of 25 acres,
28 more or less, all contained within the SE1/4 SE1/4 of Section 3,
29 and the N1/2 NW1/4 of Section 11, Township 9 South, Range 4 West,
30 M.P.M. from May 10 to August 15, inclusive, of each year.

31 The changes are as follows: To move the point of diversion
32 further upstream to a point in the SE1/4 NW1/4 SW1/4 of Section 14,
Township 9 South, Range 4 West, M.P.M. and to irrigate a total of

1 25 acres, more or less, in the W1/2 W1/2 of Section 14, from
2 May 10 to May 31, inclusive of each year. The approved
3 changes are for the point of diversion, place of use and
4 period of diversion and for no other reason.

5 2. That from June 1 thru August 15, the priorities and
6 places of use reflected in the Ruby River Decree shall
7 prevail, except that the Applicant upon determination that
8 no adverse affect will be done to the Objector may temporarily
9 change the use of the subject appropriation to the new lands
10 described herein.

11 3. The Applicant shall install and maintain adequate
12 measuring devices to enable the Applicant to keep record of
13 all quantities of water diverted and used, as well as the
14 periods of such diversion and use. Such records shall be
15 present^{ed} to the Department for inspection upon demand.

16 4. The granting of Authorization to Change Appropriation
17 Water Right No. 11,454-c41C by the Department in no way
18 reduces or alters the Applicants' liability for damage
19 caused by the Applicants' exercise of said change authorization,
20 nor does the Department in issuing this change in any way,
21 acknowledge liability for damage caused by the Applicants'
22 exercises of this Authorization.

23 5. The granting of this Authorization to Change Appropriation
24 Water Right in no way grants the Applicant any right to
25 violate rights of any other party, nor does it excuse the
26 Applicant from any liability for same, even if such violation
27 is a necessary and unavoidable consequence of exercising
28 this change.

30 NOTICE

31
32 This Proposal for Decision is offered for the review
and comment of all parties of record. The review and comment

1 period shall commence with the mailing of this Proposal for
2 Decision and shall end ten (10) days thereafter. No extentions
3 of time for comment will be granted.

4 The Final Decision and Order in this matter will be sent
5 to all parties by certified mail.

6 The Hearing Examiner's final decision may be appealed in
7 accordance with the Montana Administrative Procedures Act,
8 by filing a petition in the appropriate court within thirty (30)
9 days after service of the Final Decision and Order.

10 As stated prior to the hearing by William F. Throm, who has
11 since retired, the Proposed Order, Findings of Fact and Conclusions
12 of Law was prepared by the undersigned, who was present during
13 the entire hearing proceeding.

14 DATED this 12th day of March, 1979

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18 FORREST TEVEBAUGH
19 HEARING EXAMINER
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